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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS,
Appellants,
vs.
RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

APPELLEES' BRIEF

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California (Appendix A to Appellants' Brief) is reported at 364 F.Supp. 196 (N.D.Cal. 1973).

QUESTION PRESENTED

Does appellants' allegation of a denial of access to sources of information which are not freely available to every citizen state a claim upon which relief can be granted?

STATEMENT OF FACTS

Appellants Eve Pell, Betty Segal and Paul Jacobs entered into this litigation as plaintiffs through an amended complaint filed March 8, 1972 (A. 22-41). The introduction of this complaint set forth the purpose of appellants' joinder in the action:

> "Various media people, including plaintiffs in this complaint, have requested and do desire, to visit specific prisoners, including other plaintiffs in this complaint. The purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter." (A. 23).

Appellant Eve Pell alleged that she was a free lance writer who had written and edited books and magazine articles concerning prisons and racism (A. 24). She also asserted that she was the editor of publications "concerned with the oppression of third world peoples in the United States and also the conditions of the adjustment centers in California prisons" (A. 27). The amended complaint averred that appellant Pell had been denied permission on February 15, 1972, to interview inmate John Larry Spain who was "housed in the adjustment center at San Quentin on August 21, 1971, the day that George Jackson and five others were killed" (A. 27).

Appellant Betty Segal is identified in the amended complaint as a reporter for the weekly newspaper, *Freedom News,* in Richmond, California (A. 24). She claimed that her application to interview inmate Bobby Bly, regarding a law suit he had filed in fed-

eral court, was denied by San Quentin Prison authorities on February 16, 1972 (A. 28). According to the complaint, Mr. Bly's suit involved "allegations that San Quentin officials arbitrarily and unfairly locked up over one hundred prisoners, primarily black and chicano, because of their political beliefs and not because of any violation of prison rules or regulations" (A. 28).

Appellant Paul Jacobs is described in the amended complaint as a television reporter for educational station KQED in San Francisco and, like appellant Pell, as a free lance writer and author of many publications concerning racism and prisons (A. 24). Appellant Jacobs claimed his request to interview inmate Michael Shane Guile at San Quentin Prison was disapproved on February 15, 1972 (A. 28). The purpose of the visit, according to the complaint, was to "discuss prison conditions, recent events at San Quentin, and to obtain his [Guile's] views of racism and the relationship between blacks and whites within the walls" (A. 28-29).[1]

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[1]Subsequent to this issuance of the August 16, 1973, order of the district court, which recognized an inmate's right to press interviews, appellant Jacobs interviewed inmate Guile, and Trish Beall of *Freedom News* interviewed inmate Bly in place of appellant Segal who was no longer associated with *Freedom News;* the interviews took place on January 18 and 21, 1974.

On November 14, 1973, the district court refused to permit the interview between inmate Spain and appellant Pell because at that time Mr. Spain was charged with the murders arising out of the August 21, 1971, events at San Quentin Prison and the state trial court, Superior Court of Marin County, had issued a "gag order" prohibiting public comment on the facts of the case.

The validity of the August 16, 1973, order of the district court, insofar as it granted relief to the inmates, is being challenged by appellees. *Procunier v. Hillery,* USSC 73-754.

Appellants sought declaratory relief and preliminary and permanent injunctions prohibiting appellees from denying them permission for the interviews (A. 29-30).

On April 6, 1972, appellees moved to dismiss the amended complaint for failure to state a claim upon which relief might be granted [Federal Rules of Civil Procedure, Rule 12(b)], and for failure to raise a substantial federal question (A. 43-52).

On February 14, 1973, the three-judge district court had before it appellees' motion to dismiss and appellants' motion for a preliminary injunction (A. 205-206). Appellants stated: "We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoners." (A. 217). Appellants argued that they had a special news gathering right at the prisons and urged the court to recognize such a right (A. 214-218, 266-269). Upon questioning, appellants explained their position:

> "Judge Williams: Isn't what you are contending mean in effect that the press contends they can have special access to information not available to the public generally?
>
> "Ms. Roberts [appellants' attorney]: The press is always in a different position than the public generally. * * *" (A. 217)

Appellants described this position as the media's "special right as representatives of the public" (A. 218). They also referred to it as a "higher right than that of the general public" (A. 266).

Appellants presented no witnesses at the hearing. Appellees, however, called Phillip Guthry [Guthrie], Information Officer of the California Department of Corrections, as a witness in opposition to appellants' motion for a preliminary injunction (A. 239-240). Mr. Guthry discussed the operation and impact of California Department of Corrections Manual Section 415.071[2] during the period of its enforcement, August 23, 1971, through November 1, 1972 (A. 240-241).[3]

During this period the press had "virtually unlimited" access to correctional employees and administrators (A. 241). Moreover, press conferences were held and newsmen were taken on tours of institutions; press releases were issued and brochures were printed (A. 242). In addition, newsmen were permitted to interview inmates, randomly selected, on general topics and special topics (A. 242-247). The only limitation upon news gathering was Section 415.071 which precluded interviews with designated inmates (A. 244-247).

The district court, on August 16, 1973, granted appellees' motion to dismiss appellants' complaint

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[2]This administrative regulation provides: "Press and other media interviews with specific individual inmates will not be permitted." A temporary restraining order, issued on November 1, 1972, prior to the appointment of a three-judge district court enjoined the use of this provision (A. 3).

[3]On February 14, 1973, the three-judge district court granted a motion by the American Civil Liberties Union, *amicus curiae*, to file a memorandum on behalf of six members of the press, and granted appellees ten days to respond (A. 4, 204). On February 23, 1973, appellees filed a memorandum in response and attached thereto the transcript of appellee Procunier's testimony in *Washington Post v. Kleindienst*, 357 F.Supp. 770 (D.D.C. 1972) (A 272). Appellee Procunier likewise discussed the operation and impact of Section 415.071 (A. 288-291, 300).

(Appellants' Brief, Appendix A, p. 47). The district court found, contrary to the allegations and arguments of appellants, that "the press enjoys no greater right to access to news sources than the average citizen" (Appellants' Brief, Appendix A, p. 34). Furthermore, the court noted that Section 415.071 was not a total ban and that the press was given the freedom to enter the California institutions and interview inmates at random (Appellants' Brief, Appendix A, pp. 34, 36). The court also recognized that Section 415.071 did not constitute a prior restraint or restriction on what the press might publish and did not constitute an express or implied command that the press publish that which it preferred to withhold. (Appellants' Brief, Appendix A, p. 35).

SUMMARY OF ARGUMENT

Appellants Eve Pell, Betty Segal, and Paul Jacobs claimed that they had a right under the First Amendment, which is not enjoyed by the average citizen, to access to individual prisoners selected by them for interviews. As the First Amendment does not grant a right to some citizens, of access to a source of information which is not freely open to all citizens, appellants' complaint was properly dismissed.

Although prisons are traditionally closed to the public, appellees afford members of the general public access to the state's correctional facilities. The general public may view the facilities and may participate in inmate programs. Appellees afford newsmen at least as much. Appellees facilitate newsgathering by permitting newsmen to interview any inmate on

any subject during the course of an institutional visit, by permitting newsmen to sit in on inmate programs and to interview inmate participants, and by authorizing special reports and studies by newsmen which may involve direct contact with inmates.

Although no member of the general public has a constitutional right to enter a prison and to visit with an inmate designated by him, appellees afford certain persons limited visiting privileges with inmates designated by them. These exceptions are reasonable in that they serve to foster rehabilitation by affording an opportunity for the establishment of personal relationships which benefit the inmate. These exceptions do not constitute an invidious discrimination against any member of the general public, including appellants, and thus appellants' complaint was properly dismissed.

ARGUMENT

I

AS THE FREEDOM TO PUBLISH IS A PERSONAL RIGHT ENJOYED BY ALL CITIZENS, APPELLANTS DO NOT HAVE A RIGHT OF ACCESS TO SOURCES OF INFORMATION WHICH ARE NOT OPEN TO ALL CITIZENS, AND THUS THEIR COMPLAINT WAS PROPERLY DISMISSED.

The guarantee of freedom of the press is not a guarantee to a particular group, but rather is a guarantee to all citizens of a particular mode of expression. As observed by this Court, "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and

opinion.' (Citation omitted)." *Branzburg v. Hayes,* 408 U.S. 665, 704 (1972). "History shows us that the Founders were not always convinced that unlimited discussion of public issues would be 'for the benefit of all of us' (footnote omitted), but that they firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion.' (Citation omitted)." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 149-150 (1967). Accordingly, the right which is guaranteed may be more aptly described as the freedom to publish. As the right to publish is enjoyed by all citizens (*Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 388 (1969)), the right cannot be invoked as a basis for affording to certain persons privileges which are denied to other citizens. *See Branzburg, supra,* 408 U.S. at 704.

Moreover, dividing citizens into categories of "newsmen" and "non-newsmen" for the purpose of defining persons who would be constitutionally entitled to privileges not afforded to every citizen would be a most difficult task. As observed by this Court, "The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, . . . [n. 40]. Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity . . . It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into

the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste (Citations omitted). By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." *Branzburg v. Hayes, supra,* 408 U.S. 665, 705 (1972).[4] This Court has likewise recognized the difficulties inherent in drawing distinctions on the basis of the public's desire to receive information. In *Kleindienst v. Mandel,* 408 U.S. 753, 768-769 (1972), this Court observed: "In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well-known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under §212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary dis-

[4]*See generally, McMillan v. Carlson,* ..... F.Supp. ....., Civ. 72-2551-M (D.Mass. Dec. 31, 1973) (recognizing *inter alia* that an author who is engaged in the preparation for writing a book which will contribute to the flow of information regarding a public event is engaged in newsgathering; slip opinion at 5); *Application of Cepeda,* 233 F.Supp. 465, 473 (S.D.N.Y. 1964) (holding *inter alia* that author of magazine article does not come within news reporters' privilege statute).

cretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audiences' interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious." Accordingly, practicalities militate against arriving at a definition of newsmen who are to be given a distinct constitutional status.

As recognized by this Court, "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *New York Times Co. v. United States,* 403 U.S. 713, 728-730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns. v. Valente,* 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954)." *Branzburg v. Hayes, supra,* 408 U.S. 665, 684 (1972).[5] As the right of freedom to publish is

[5]*Accord, Trimble v. Johnston,* 173 F.Supp. 651, 656 (D.D.C. 1959); *Azbill v. Fisher,* 442 P.2d 916, 918, 84 Nev. 414 (1968); *Yarish v. Nelson,* 27 Cal.App.3d 893, 899, 104 Cal.Rptr. 205 (1972); *Los Angeles Free Press Inc. v. City of Los Angeles,* 9 Cal.App.3d 448, 455, 88 Cal.Rptr. 605, 610 (1970).

Where a source of information is freely available to any member of the general public, First Amendment considerations may be relevant. As recognized by this Court, "Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Branzburg v. Hayes, supra,* 408 U.S. 665, 707-708 (1972).

guaranteed to every citizen, and as clear distinctions among publishers are practically impossible, the validity of these holdings is obvious. Freedom to publish does not entail awarding special privileges to certain individuals. *See Branzburg, supra,* 408 U.S. at 690; *Estes v. Texas,* 381 U.S. 352, 540 (1965); *id.* at 584 (WARREN, C. J., concurring); *id.* at 589 (HARLAN, J., concurring).

In the amended complaint, appellants each averred that he had been denied permission to meet with a specified prisoner (A. 27-29). At the hearing before the three-judge court, appellants stated: "We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoner" (A. 217).[6] Rather, it was appellants' contention that a publisher had "a higher right than

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[6]If appellants had contended that the First Amendment grants every citizen a right to enter a penal institution for the purpose of meeting with an inmate designated by the citizen, such a contention would have had to be rejected. "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *Branzburg v. Hayes,* 408 U.S. 665, 684 (1972).

A penal institution is not a public forum. *Cf. Grayned v. City of Rockford,* 408 U.S. 104, 121 n. 49 (1972). Penal institutions, built for security purposes, are traditionally not open to the public. *Adderley v. Florida,* 385 U.S. 39, 41 (1966). Citizens do not have a constitutional right to enter a penal institution. *See O'Malley v. Brierley,* 477 F.2d 785, 793 (3d Cir. 1973). Accordingly, any contention that denying a citizen an opportunity to meet with an inmate designated by the citizen is a violation of the citizen's rights under the First Amendment must be rejected for no such right exists within this context. *See O'Malley, supra,* 477 F.2d at 793.

that of the general public" (A. 266). As appellants thus claimed that they had a "higher right" than "individuals on the street" to access to specific prisoners, they failed to state a claim on which relief could be granted.

II

APPELLANTS, AS MEMBERS OF THE GENERAL PUBLIC, HAVE NOT BEEN SUBJECTED TO UNLAWFUL DISCRIMINATION.

Appellants assert that the district court misconstrued their claim as they were only seeking the visiting privileges which were afforded to family and friends, clergy and attorneys, and special purpose visitors (Appellants' Brief at 10-11). Appellants assert that the denial of the same visiting privileges to the press constitutes an unlawful discrimination (Appellants' Brief at 11-13).

No allegations in the amended complaint suggest such a claim. Appellants' averment that "the public is unable to obtain this information on its own" (A. 23) negates any implication that appellants were claiming something other than a special right of access. Moreover, at the hearing before the three-judge court, appellants explicitly stated that they should not be subject to a limitation which is attached to certain types of visiting privileges.[7]

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[7]The visiting regulations which were in effect at San Quentin State Prison at the time the amended complaint was filed, as well as those which were in effect a year later, included the following limitation: "No person will be permitted to visit with more than one (1) inmate of the California Department of Corrections unless

As appellants failed to allege any facts to substantiate a claim that appellees had unlawfully discriminated between them and such special visitors, the amended complaint was properly dismissed.[8] Moreover, it is apparent from the testimony of Mr. Guthry, which was introduced in opposition to appellants' motion for a preliminary injunction, that appellees have not unlawfully discriminated against the press. Indeed, the press has been treated quite well (A. 243-244).

Appellants' current contention is in significant respects *sui generis*. The distinctive qualities of appellants' assertion flow from the particular circumstances of this case, and from the general attributes of a penal institution. As observed by Justice Rehnquist "a long line of decisions by this Court has recognized that the 'equal protection of the laws' guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent way in the multitudinous fact situations that may confront the courts (Footnote omitted)." *Cruz v. Beto*, 405 U.S. 319, 325-326 (1972). When appellants' contention is evaluated in reference to the unique factual context in which it is presented, it clearly fails to state a claim upon which relief can be granted.

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said person is a member of the immediate family of both inmates." (A. 72, 103). At the hearing before the three-judge court appellants asserted: "By nature of the press' rights as defined in the First Amendment, I think that they can rise above the mere limitations to visit one prisoner so that they can visit other prisoners." (A. 270).

[8]It should be observed that appellants were represented by counsel (A. 1).

First, this is not a case wherein there is an absolute denial of an asserted benefit. *See generally, Rosario v. Rockefeller,* 410 U.S. 752, 756-759 (1973); *McDonald v. Board of Election,* 394 U.S. 802, 807-808 (1968); *cf. Kusper v. Pontikes,* ..... U.S. ....., 94 S.Ct. 303, 309 (1973); *O'Brien v. Skinner,* ..... U.S. ....., 38 L.Ed.2d 702, 708 (1974). A showing that there is no absolute denial of the asserted benefit militates against the finding of a suspect classification. *See San Antonio School District v. Rodriguez,* 411 U.S. 1, 23-25 (1973).

As found by the district court, "The regulation [section 415.071] does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population (Footnote omitted). Thus, media representatives are able to interview an inmate, . . . " (Appellants' Brief, Appendix A, at p. 34). The district court also recognized that the practice under section 415.071 was distinguishable from the regulation which is currently before this Court in *Saxbe v. Washington Post Company,* USSC 73-1265 (Appellants' Brief, Appendix A at pp. 35-36).

The findings of the district court are clearly substantiated by the testimony of Mr. Guthry. Newsmen were permitted to tour the state's correctional institutions, and such tours could encompass both the maximum and minimum security sections of the institution (A. 243-244, 259). During the course of such tours, newsmen could interview any inmate on any

subject (A. 243-244). If it was desired, the prison personnel would step aside in order that the interview would be confidential (A. 243-244).[9] Newsmen could also interview inmates who were randomly selected for the purpose of writing a story on a specific topic (A. 242-243). If a newsman wished to do a story on a specific program, such as alcoholics anonymous or an ethnic study course, he could sit in on the group meeting and interview the inmate participants (A 243). Newsmen were also assisted in preparing stories on special topics. When a newspaper informed the Department that it wished to interview life inmates on their opinion of capital punishment, the Department asked three different institutions to select representative inmates. The reporters interviewed the inmates and wrote a story (A. 242-243). Similarly, at the time that death row was being phased out, a television reporter asked to film activities on death row and to speak to inmates whom he might encounter. The television reporter was permitted to conduct this film interview (A. 243). The Department did not exercise any control over what was ultimately written or published as a result of these interviews between newsmen and inmates (A. 244). Quite a few of the stories which were published were critical (A. 260). Consequently, the only limitation upon news gathering was that the newsman could not specify by name the inmate whom he wished to interview.

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[9]It should be noted that, respecting non-privileged communications, "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. New York*, 370 U.S. 139, 143 (1972).

By comparison, the regulation which is at issue in *Saxbe v. Washington Post* provides only for spontaneous contacts during supervised, inspection tours; it limits the topics which may be discussed; it also limits the duration of any such conversations to five to ten minutes; and newsmen are requested not to identify any inmate. *Washington Post v. Kleindienst,* ..... F.2d ..... (D.C. Cir. Feb. 21, 1974), *cert. granted, sub nom. Saxbe v. Washington Post,* ..... U.S. ..... (March 4, 1974).[10]

Secondly, this is not a case wherein the limitation results in the curtailment of a constitutional right. As recognized by this Court, penal institutions are built for purposes of security, and are traditionally not open to the public. *Adderley v. Florida, supra,* 385 U.S. 39, 41 (1966). Citizens do not have a constitutional right to enter a penal institution. *See O'Malley v. Brierley, supra,* 477 F.2d 785, 793 (3rd Cir. 1973).[11] Representatives of the news media have no constitutional right of access to information which is not available to the general public. *Branzburg v. Hayes, supra,* 408 U.S. 665, 684 (1972). As is apparent from the testimony of Mr. Guthry, every member of the general public does not have an absolute right

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[10]The decision of the Circuit Court for the District of Columbia appears at Appendix F to the supplemental petition for a writ of certiorari in *Saxbe v. Washington Post Company,* USSC 73-1265.

[11]Accordingly, decisions which concern access to places which are freely accessible to any citizen (*e.g., Police Department of Chicago v. Mosley,* 408 U.S. 92, 94 (1972); *Channel 10 Inc. v. Gunnarson,* 337 F.Supp. 634, 638 (D.Minn. 1972)), are inapposite. *See Zemel v. Rusk, supra,* 381 U.S. 1, 16-17 (1965).

to meet with any inmate whom he may designate (A. 262-263).[12]

However, as is likewise apparent from the testimony of Mr. Guthry, the general public is not barred from the state's correctional institutions. Members of the general public may take tours of the institutions (A. 246).[13] Members of the general public may

[12]It is likewise apparent from the visiting regulations which were in effect at San Quentin State Prison in November of 1972, that persons who are approved as a visitor for a specific inmate must satisfy conditions and must observe various limitations. The requesting inmate must fill out a form; the proposed visitor must then fill out a form; these must be examined for consistency (A. 101). Visiting may be restricted if the relationship is harmful to the inmate, the visitor, or any other person (A. 100). The number of persons who may be approved as visitors for a specified inmate is limited (A. 100). The number of visits which an approved visitor may have with a specific inmate is limited (A. 100, 103). A visitor may meet with only one inmate (A. 103). An exception is made if the visitor is a member of the immediate family of more than one inmate (A. 103). The visiting regulations which were in effect at the time the amended complaint was filed were even more restrictive. Under these regulations no person could be approved unless he was a member of the inmate's family or a friend of long-standing (A. 69).

[13]For example, at the time the amended complaint was filed, San Quentin State Prison had the following regulation pertaining to such tours:

"A. Public tours of the institution:

1. During the months of February through October, tours of mixed groups, societies, clubs, etc., of approximately 200 adults, are conducted on Saturday nights. A charge is made to cover costs of food, escort, and a contribution to the Inmate Welfare Fund. The Officer of the Day is ordinarily in charge.

2. Specific reservations are required for individuals or groups. Arrangements are made through staff designated by the Warden.

3. Tours by approved special guests will be arranged by the Warden's Office at any time during the normal working day. The Custodial Division will furnish officer escort, unless otherwise arranged; i.e., educators may be escorted by staff of the Education Department, etc. Such tours begin and end in the Warden's office, with an interview with the Warden or the Associate Warden, Administration, if possible." (A. 66-67).

also participate in institutional programs (A. 246).[14] Newsmen are likewise permitted to tour the institutions (A. 243-244, 259), and to observe institutional programs (A. 243). Accordingly, newsmen are clearly not denied access to sources of information which are available to the general public.

On the contrary, the testimony of Mr. Guthry indicates that newsmen were in fact given special attention:

> "Q. Now, between the period of August, 1971 and November, 1972, what were the procedures within the Department of Corrections for media access to administrators and employees of the Department?
>
> A. Well, press has virtually unlimited access to employees and administrators. In fact, we go out of our way to try to make ourselves available and to service the media, recognizing the role they play in keeping the public informed.
>
> Q. Now, what methods or means are used to inform the press through the administrators and the employees in the Department?
>
> A. In this period in particular, we were in an arduous period and we had a great many inquiries. I had days of 80 inquiries.

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[14] For example, at the time the amended complaint was filed, the following regulation was in effect at San Quentin State Prison:

"B. Citizen participation in the institutional program:

1. Trade Advisory Groups working with both staff and inmate committees.

2. Academic Advisory Committee (works with staff and inmate committee).

3. Citizen volunteers (working with Alcoholics Anonymous, Speakers Clubs, athletic events, and other inmate groups)." (A. 67).

Beyond that, you have press conferences, and hand out press releases, we print brochures, we take newsmen on tours through institutions and permit them to interview staff and inmates and, in general, make a real serious effort to work with the media so they can get the information they want.

Q. What were the procedures for access to institutional facilities themselves by members of the media?

A. I can give you an example. Say, a newsman was interested in doing a particular story in a prison. He might call the prison director or he might contact me.

If he contacted me, I would deal with the institution, explain what the nature of the story he wanted to do, and arrange for him to enter the institution, talk to inmates, staff, see the facilities and, generally try to help him find whatever information he wanted" (A. 241-242).

Thirdly, this is not a case which presents the question of the validity of the exclusion of persons from a public place (*cf. Police Department of Chicago v. Mosley, supra,* 408 U.S. 92, 94 (1972)), but rather the question of determining what type of access may be granted to an area which traditionally is closed to the public (*Adderley v. Florida, supra,* 385 U.S. 39, 41 (1966)). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley, supra,* 385 U.S. at 47. The public has no constitutional right to enter a prison. *See O'Malley v. Brierley, supra,* 477 F.2d 785, 793,

795 (3rd Cir. 1973). As recognized by this Court, a state has a strong interest in the administration of its prisons (*Prieser v. Rodriguez,* 411 U.S. 475, 491-492 (1973)), and traditionally such facilities have not been open to the public (*Adderley, supra,* 385 U.S. at 41).

By virtue of state law, "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in [appellee Procunier]." Cal. Pen. Code § 5054. Accordingly, appellee Procunier must necessarily have the authority to determine whether persons are to have access to the state's correctional institutions, and the type of access which is to be permitted. *Cf. Kleindienst v. Mandel, supra,* 408 U.S. 753, 765-767 (1972).[15] As recognized by this Court, "prison officials must be accorded latitude in the administration of prison affairs, . . ." *Cruz v. Beto, supra,* 405 U.S. 319, 321 (1972). In exercising their discretion, prison officials may clearly give consideration to the maintenance of security and the fostering of rehabilitation, as these are obviously justifiable objectives. *See McGinnis v. Royster,* 410 U.S. 263, 273-276 (1973).

Given these three considerations, appellants' current assertion should be evaluated under the traditional standards. See also *San Antonio School Dis-*

[15]Appellee Park has set forth his objections to legislation which would restrict the authority of prison officials to determine whether any citizen may visit with a specific inmate. Park, *On Being Medium Nice to Prisoners,* Wash.U.L.Q., 607, 615 (1973).

trict v. Rodriguez, supra, 411 U.S. 1, 19, 40-44 (1973); *Rosario v. Rockefeller, supra,* 410 U.S. 752, 756-758 (1973); *McDonald v. Board of Election,* 394 U.S. 802, 807 (1968). "[M]ere classification, as this Court has often said, does not of itself deprive a group of equal protection (Citation omitted)." *Carrington v. Rash,* 380 U.S. 89, 92 (1965). " 'The constitution does not require things which are different in fact . . . to be treated in law as though they were the same' (Citation omitted)." *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966). "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery v. Midland County,* 390 U.S. 474, 484 (1968). "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts (Citations omitted)." *United States v. Maryland Savings—Share Ins. Corp.,* 400 U.S. 4, 6 (1970). "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' (Citation omitted); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked (Citation omitted)." *McDonald, supra,* 394 U.S. at 809.

Though prisons be closed to the public generally, appellees may reasonably allow certain persons to

visit individual inmates at the request of the inmates. As recognized by appellants: "Admittedly, each of these visiting groups has some kind of more than 'average' interest that makes a visit necessary, . . ." (Appellants' Brief at 11). The protection of an inmate's legal rights is clearly a rational basis for permitting attorneys to visit with specific inmates. The enhancement of inmate's religious practices is clearly a rational basis for permitting clergy to visit with a specific inmate. Considerations of rehabilitation obviously afford a reasonable basis for determining that an inmate may have visits from members of his family and other persons whose relationship with the inmate has a beneficial effect upon the inmate. The fact that California's correctional institutions have adopted laudable policies, permitting certain persons to visit with individual inmates, should not render such policies an invidious and arbitrary scheme. *Cf. McDonald v. Board of Election, supra,* 394 U.S. 802, 810-811 (1969).

Appellees have determined that every citizen should not be permitted an absolute privilege to visit with any inmate whom he may designate, no matter how willing the inmate. Considerations of efficient administration obviously dictate that limitations be placed on visits with specific inmates; considerations of security clearly dictate that the persons who may be permitted to visit with a specific inmate be restricted; considerations of rehabilitation clearly dictate that a specific inmate's associations with others be closely supervised. These are fundamental factors in the

operation and administration of correctional institutions.[16]

Appellees have not adopted a rigid approach to public access to the state's correctional institutions. Citizens are permitted to tour the institutions and to participate in inmate programs (A. 246). Appellees have not excluded news representatives from such access (A. 243-244, 259). On the contrary, appellees have in fact given added consideration to news representatives by assisting them in gathering news through interviews with inmates and staff (A. 241-242).

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[16]Appellees' determination not to afford news representatives a type of access different from that afforded the general public was based on these considerations. As stated by the district court: "Prior to the implementation of § 415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960's such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon of the 'prison celebrity' or 'big wheel'—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the 'celebrity' over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison. [¶] It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem." (Appellants' Brief, Appendix A, at p. 33). As is fully set forth in Appellants' Brief in *Procunier v. Hillery*, USSC No. 73-754, this determination did not abridge the rights of inmates as it is rationally related to the furtherance of the legitimate objectives of the penal system.

Accordingly, even if appellants had alleged in their amended complaint that certain persons were approved as visitors of requesting inmates whom they designated by name, they would not have stated a claim upon which relief could be granted. Appellees' decision that certain persons but not all persons should be permitted to visit with inmates specified by name is clearly a reasonable determination which relates to appellees' legitimate interests in fostering rehabilitation, maintaining security and, particularly in the instant case, restoring order.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order of the district court dismissing appellants' amended complaint must be affirmed.

Dated, April 3, 1974.

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